STATE OF CALIFORNIA

98 JUL 30 PM 0:59

OFFICE OF ADMINISTRATIVE LAW

In re:	)	1998 OAL Determination No. 11
Request for Regulatory Determination filed by R. HEWITTS ENTERPRISES, INC. concerning the definition of the word "exchange" used by the BUREAU OF AUTOMOTIVE REPAIR to restrict statements relating to engine rebuilding[1]	)	[Docket No. 91-007]
	)	July 30, 1998
	)	Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
DAVID POTTER, Senior Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether the definition of the term "rebuilt engine exchange" used by the Bureau of Automotive Repair to restrict the statements of automotive repair dealers relating to engine rebuilding is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the definition of the term "rebuilt engine exchange" is not a "regulation" required to be adopted pursuant to the APA.

7

THE ISSUE PRESENTED

The Office of Administrative Law ("OAL") has been requested to determine [2] whether the definition of the expression "rebuilt engine exchange" used by the Bureau of Automotive Repair to restrict statements of automotive repair dealers relating to engine rebuilding is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[3],[4]

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE BUREAU OF AUTOMOTIVE REPAIR'S QUASI-LEGISLATIVE ENACTMENTS?

Business and Professions Code section 9882 provides as follows:

> "There is in the Department of Consumer Affairs a Bureau of Automotive Repair under the supervision and control of the director. The duty of enforcing and administering this chapter is vested in the chief who is responsible to the director. The director may adopt and enforce those rules and regulations that he or she determines are reasonably necessary to carry out the purposes of this chapter and declaring the policy of the bureau, including a system for the issuance of citations for violations of this chapter [Chapter 20.3 - Automotive Repair] as specified in Section 125.9. These rules and regulations shall be adopted pursuant to [the APA.]"[5]

Clearly, the APA applies to the Bureau's rulemaking.[6]

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure .... [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[7] the California Court of Appeal upheld OAL's two-part test[8] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we

must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[9]

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

The wording of the rule challenged by this request for a determination is not available in any document of record issued by the Bureau. Nevertheless, one can surmise from the records of certain enforcement actions commenced against the requester that the Bureau must have a definite understanding of what the expression "rebuilt engine exchange" means in the context of automotive engine rebuilding. The requester described what he believes to be the substance of the rule as follows:

> "When the word 'exchange' is used with any of the following expressions, 'rebuilt, reconditioned, remanufactured, or overhauled', or by any expression of like meaning, it shall mean that the engine installed is not the customer's unit that was removed from the customer's vehicle. . . . ."

Although the request has been framed using the phrase *rebuilt engine exchange*, for the purposes of this determination, we will focus on the word "*exchange,*" with the understanding that the inquiry involves its use in the field of auto repair and engine rebuilding. The requester alleges that the Bureau's understanding of these words is not the only reasonable interpretation, and that the Bureau's efforts to prohibit use of the word *exchange* in circumstances where a customer's worn engine is rebuilt and reinstalled in the same car evidence the Bureau's adoption of a definition; in essence, a regulation which makes the Automotive Repair Act more specific.

Although disagreeing that it has adopted a regulation, the Bureau freely admits that its understanding of the meaning of the word *exchange* is applied uniformly throughout the state in its administration of the Automotive Repair Act. It is therefore apparent that the definition of the word *exchange* employed by the Bureau is indeed a standard of general application.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

The definition of the word *exchange* utilized by the Bureau is not a rule of procedure, so our inquiry must focus on the question of whether it makes the law enforced by the Bureau more specific. One of the primary missions of the Bureau is to protect consumers. In furtherance of that activity, the Legislature, in 1971, added section 9882.5 to the Business and Professions Code. It provides, in part:

> "The director shall on his own initiative or in response to complaints, investigate on a continuous basis and gather evidence of violations of this chapter and of any regulation adopted pursuant to this chapter, by any automotive repair dealer or mechanic, whether registered or not, and by any employee, partner, officer, or member of any automotive repair dealer. The director shall establish procedures for accepting complaints from the public against any dealer or mechanic. . . . ."

Two principle features of the chapter (the Automotive Repair Act) are: (1) a provision which requires a comprehensive invoice listing all parts used in a repair and (2) a provision that gives a customer the right to have the parts replaced during a repair returned, and by this means receive some assurance that the work described in the invoice has actually been done.

Concerning the invoice, Business and Professions Code section 9884.8 provides, in part:

> "All work done by an automotive repair dealer, including all warranty work, shall be recorded on an invoice and *shall describe* all service work done and *parts supplied.* Service work and *parts shall be listed*

separately on the invoice, which shall also *state separately* the subtotal *prices* for service work and *for parts*, not including sales tax, and shall state separately the sales tax, if any, applicable to each."[Emphasis added.]

The right to the return of parts set forth in Business and Professions Code section 9884.10 includes an exception for:

> "such parts as may be exempt because of size, weight, or other similar factors from this requirement *by regulations* of the department and excepting such parts as the automotive repair dealer is required to return to the manufacturer or distributor under a warranty arrangement. [Emphasis added.]"

The Bureau implemented this provision in 1983 by adopting section 3355 of Title 16 of the CCR which provides:

> "Those parts and components that are replaced and that are *sold on an exchange basis* are exempt from the provisions of Section 9884.10 of the Act requiring the return of replaced parts to the customer, provided the customer is informed that said parts are not returnable orally and by written record on the work order and invoice. When a request is made before the work is started, the dealer shall provide a reasonable opportunity to the customer to inspect the part. [Emphasis added.]"

Thus, an automotive repair dealer which supplies a part used in repair on an exchange basis is relieved of the obligation to provide the replaced part to a customer. In the context of engine rebuilding, an automobile engine that has been removed from a vehicle (e.g., car "A"), disassembled, machined as necessary, and reassembled with some new parts may be offered as an exchange engine (*a component replaced and sold on an exchange basis*) for use in another vehicle (e.g., car "B") without providing the old replaced parts to the customer (owner of car "B"). Replacement engines rebuilt by engine remanufacturers are commonly sold on an exchange basis without the old replaced parts, in accordance with section 3355 above.

The matter of greatest interest to the requester is the question of whether an automotive repair dealer who repairs a customer's car by rebuilding its engine can properly describe the transaction as a *rebuilt engine exchange*. If so, then the requester's use of such language would appear to be lawful and it could avail itself of the exemption from the need to return replaced parts to customers. On the other hand, if the word "exchange" is only properly used in circumstances where the engine block installed in the customers car after the repair is not the same one it had before the repair, then the automotive repair dealer that rebuilds the customer's engine and reinstalls it is obliged to offer the return of the replaced parts in accordance with Business and Professions Code section 9884.10.

The requester maintains that the term exchange has a specialized meaning in his industry, described in his reply brief as follows:

> "As used in the engine rebuilding industry, the term exchange means that the customer's engine must be delivered to the dealer in a rebuildable condition. This 'exchange' is required in the industry because, to keep engine rebuilding economical, the most basic parts of the motor are in part reused during reconditioning (if all new parts were used in the process the costs would double or triple to the customer). There is no difference whatsoever in what the customer receives."[10]

Neither a statute, nor a codified regulation of the Bureau defines the expression *"sold on an exchange basis"* for automobile parts generally. The requester asserts that the Bureau has informally adopted an underground regulation which narrows the meaning of the word *exchange* by excluding its reasonable use in circumstances such as those which occur in the operation of its business of rebuilding customer's engines when making repairs. The requester offers as evidence of the underground regulation, Notices of Violation issued by the Bureau that indicate use of the term exchange to describe rebuilding of the vehicle's engine is viewed by the Bureau as false and misleading. If the requester's claims concerning use of the word exchange in the auto repair industry are correct, then the Bureau's adoption of a definition of the term exchange in this context which excludes certain reasonable interpretations would be the adoption of a standard of

general application making Business and Professions Code section 9884.10 and Section 3355 of Title 16 of the CCR more specific.

OAL has no opinion on the questions of the relative merits and desirability of a rebuilt original engine vs. a rebuilt engine from another source, and whether use of the word *exchange* in the context of rebuilding an original engine constitutes a significant misleading description of the manner in which the repair would be made, prohibited under section 9884.7 of the Act. The Bureau maintains that it has prosecuted the requester for violation of Business and Professions Code section 9884.7, subdivision (1)(a). This section prohibits making an untrue or misleading statement in connection with repair of a vehicle. The Bureau determined that it is misleading for an auto repair dealer to describe a contemplated repair which includes rebuilding of the *original* engine as an exchange. It is the Bureau's position that it is simply applying the most common definition of the word "*exchange*" which may be found in any English dictionary. The definition, of course, varies a little from dictionary to dictionary, but is basically this:

> "Exchange 1: the act of giving or taking one thing in return for another as if equivalent: . . . .
> 2: the act of substituting one thing in the place of another: . . ."[11]

The Bureau's analysis is that it is simply performing its duty, applying the prohibition against misleading statements utilizing the plain meaning of words. By this rationale, when a customer's car is repaired by rebuilding the engine that was in the car when it was brought in for repair, *the engine has not been exchanged.*

OAL must decide whether the Bureau's standard of general application (in other words, its understanding of the word *exchange*) makes the Automotive Repair Act and its regulations more specific. The answer depends upon an analysis of the facts. If the Bureau's understanding of the word *exchange* is the only legally tenable interpretation of its meaning, then it has simply applied the existing law, and has not promulgated a regulation. If the requester is correct in its assertion that the word *exchange* is commonly used in the engine rebuilding industry in a manner which includes rebuilding of the original engine, then the Bureau's

adoption of a narrower interpretation that precludes such use, would be a regulatory act, invalid if not done in accordance with the APA.

OAL's determination is based upon the information contained in the record and the law. The requester points to a definition of the word exchange contained in section 3361.1, subsection (b), of Title 16 of the CCR, a regulation which applies to automatic transmission service. It provides in part:

> "(b) Use of Words. When the word 'exchanged' is used with any of the following expressions, it shall mean that the automatic transmission is not the customer's unit that was removed from the customer's vehicle. . . ."

The "*following expressions*" mentioned in section 3361.1 above are "rebuilt, remanufactured, reconditioned or overhauled." The requester argues that the Bureau's adoption of this definition in the context of automatic transmission service is evidence of the fact that the term exchange is susceptible to more than one reasonable interpretation and a tacit acknowledgment of the need for a definition. The requester also alleges that the Bureau once initiated a rulemaking action that would have promulgated a definition of the word *exchange*, but abandoned the effort when it proved controversial. The fact that the Bureau has adopted a definition of the word *exchange* applicable to automatic transmission service tends to indicate that a definition of the term may be useful. There is no information in the record, however, that confirms the requester's assertion that the Bureau once attempted to promulgate a generally applicable definition of the word *exchange*, or that confirms any statement attributable to the Bureau indicating the need for such a definition. Similarly, OAL has no survey or other information which would support the requester's assertion that *exchange* is commonly used in the engine rebuilding industry in a manner which includes rebuilding the customer's engine.

In OAL's view, repairing a car by rebuilding its engine and repairing a car by removing its engine and replacing it with another one which has been rebuilt are distinctly different activities. Customers may prefer one or the other, depending upon circumstances, or may have no preference. Nevertheless, the fact that expected performance may be equal, as requester asserts, does not mean there is

no difference, and there seems to be no useful reason for describing the rebuilding of an engine as an *exchange* when the engine already in the car is to be rebuilt. If a customer wants his or her engine to be rebuilt, it is implicit that the rebuildable engine must be supplied as part of the transaction. The introduction of the word exchange in this context adds nothing, and can only serve to confuse the matter. If a customer requests an *exchange*, then the customer should receive one. We conclude that the requester's understanding of a *rebuilt engine exchange* is not consistent with the plain meaning of the words. Nor is there evidence to support the proposition that the industry uses the term with the meaning the requester attaches to it. It is therefore reasonable for the Bureau to limit use of the word *exchange* to situations where an item removed from a car will be turned in for rebuilding and another substituted in its place.

It also helps to consider the circumstances of these transactions, and the purpose of the exemption for exchange parts from the requirement that old repair parts be made available to the customer of an automotive repair dealer. Exchanged parts cannot be returned to a customer because in most circumstances the automotive repair dealer gave them up to a parts remanufacturer as part of the purchase transaction. Such is the case when an automotive repair dealer buys an engine rebuilt by an engine remanufacturing company and installs it in the customer's car. The automotive repair dealer receives only the rebuilt engine from the engine remanufacturer, not the parts removed from the engine during the rebuilding process. The automotive repair dealer ordinarily gives up the customer's engine, or the portion of the customer's engine equivalent to the portion purchased from the rebuilder. Apparently, customers usually consider the money they save to be more useful than the old parts which they give up. In situations where an automotive repair dealer rebuilds the customer's engine, there is a significant difference. All of the old parts which were not exchanged when acquiring the new parts should be on hand in the shop. For the customer who wants them back, receipt of these old parts affords some assurance that they have been replaced by new parts. The automotive repair dealer should not be able to avoid its responsibility to make the old parts available under Business and Professions Code section 9884.10 simply by describing the transaction as an *exchange*.

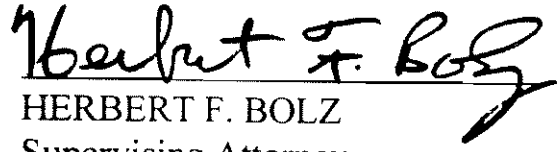
In closing, OAL notes that the requester believes that the Bureau's enforcement action against it is unfair. Requester notes that engine rebuilding companies and

automotive repair dealers are not subject to the same rules. It is true that engine rebuilding companies that deal exclusively in engines and do not repair cars are not subject to regulation by the Bureau. They are not covered by the Automotive Repair Act and do not have to offer the old parts with engines they have rebuilt. Similarly, OAL does not dispute requester's claim that the value of the repairs received by its customers is not diminished by the fact that their automobile engines were rebuilt, rather than replaced with rebuilt engines. Nevertheless, it is unreasonable to stretch the meaning of the word *exchange* to cover the engine rebuilding performed by the requester in order to secure an exemption which might put automotive repair dealers which rebuild engines on equal footing with engine rebuilding companies. Although these businesses are in competition, they are not identical, and are subject to different laws.

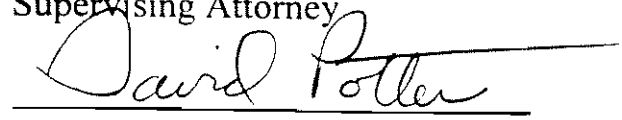
CONCLUSION

OAL concludes that the challenged policy is not a "regulation" within the meaning of Government Code section 11342 because the record indicates that the Bureau of Automotive Repair has applied the Automotive Repair Act and applicable regulations, following the ordinary meaning of the words, without utilizing a standard that makes the makes the law enforced by the Bureau more specific.

DATE: July 30, 1998



HERBERT F. BOLZ
Supervising Attorney



DAVID POTTER
Senior Staff Counsel
Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Telecopier No. (916) 323-6826
Electronic mail: staff@oal.ca.gov

ENDNOTES

1. This request for determination was brought by R. Hewitts Enterprises, Inc. ("requester"), which was represented by Robb Hewitt, Attorney, 910 Second St., Sacramento, CA 95814, (916) 452-2012. The Bureau of Automotive Repair was represented by Robert P. Oglesby, Deputy Chief, Consumer Protection Operations, 10240 Systems Parkway, Sacramento, CA 95827.

   On August 8, 1997, OAL published a summary of this Request for Determination in the California Regulatory Notice Register ("CRNR") 97, No. 32-Z, p. 1516, along with a notice inviting public comment. No public comments were received. The Bureau of Automotive Repair filed a response to the request for determination and the requester filed a rebuttal to the Bureau's response.

2. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

   > "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
   >
   > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
   >
   > (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

   See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on

other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

3. This determination may be cited as "**1998 OAL Determination No.11.**"

4. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute,* and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

5. Business and Professions Code section 9882 provides that the Bureau's regulations "shall be adopted pursuant to Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code." The reference is out of date, as this Chapter 4.5, Rules and Regulations, consisting of sections 11371 to 11445 was repealed by Statutes of 1979, Chapter 567, Section 2. Chapter 567 also enacted as the replacement for Chapter 4.5 in the Government Code, new Chapter 3.5 (commencing with section 11340) which created the Office of Administrative Law and which is the core of the legislation which makes up the modern APA.

6. The APA would apply to the Bureau's rulemaking even if Business and Professions Code section 9882 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).

7. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244.

8. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)"

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

9. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

10. Letter of Sept. 26, 1997, p. 3.

11. *Webster's Third New International Dictionary* (1976), p. 792, col. 2.